

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF OREGON**

ELIZABETH L. PERRIS
BANKRUPTCY JUDGE

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February 23, 2005

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Aaron J. Bell
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Re: Marcy Rose Gilroy, Case No. 03-38255-elp7
Debtor's Objection to Trustee's Statement of Costs and
Fees

Dear Counsel:

The purpose of this letter is to explain my conclusion that debtor must pay \$4,755.50 to reimburse the trustee for his attorney fees in pursuing settlement of her disability claim, as a condition of allowance of her belatedly claimed exemption under ORS 743.050. The trustee filed a statement of fees and costs in which he seeks \$4,750 for his lost trustee's fee on the \$40,000 settlement amount, \$5.72 in his costs, and \$11,094.50 in legal fees and \$36.41 in costs in pursuing settlement. Debtor objects, arguing first that she should not be required to pay anything as a condition of allowance of the exemption or, in the alternative, that she should not be required to pay the trustee's lost fee and costs or any attorney fees or costs incurred in objecting to debtor's claim of exemption.

Debtor argues that she should not be required to reimburse the trustee for his costs in pursuing the settlement as a condition to allowance of the exemption, because the settlement did not result in a fund from which the payment could be made. She points to three cases, In re Arnold, 252 B.R. 778 (9th Cir. BAP 2000), In re Fournier, 169 B.R. 282 (Bankr. D. Conn. 1994), and In re Blaise, 116 B.R. 398 (Bankr. D. Vt. 1990), which she argues stand for the proposition that a debtor need not reimburse a trustee for expenses incurred in pursuing an asset during the period before the debtor claimed it as exempt, unless the asset is an existing fund from which those expenses can be paid.

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I disagree with debtor for four reasons. First, debtor did not make this argument before I ruled on the objection to exemption, despite the fact that the trustee raised the issue in his Memorandum of Points and Authorities in Support of Trustee's Objections to Claimed Exemptions. The time to make legal arguments was before, not after, I ruled.

Second, I do not agree that the cases cited stand for the proposition that a debtor cannot be required to pay amounts to alleviate any prejudice to creditors from a belated claim of exemption only where there is an identifiable exempt fund from which payment can be made. Although, in the cases cited, there was an exempt fund from which payment could be made, the court's reasoning was that creditors would be prejudiced by the allowance of the belatedly claimed exemption, but the prejudice could be mitigated by the debtor's payment of the trustee's "counsel's fees and costs from assets not otherwise available to the estate." Arnold, 252 B.R. at 789. Those assets need not necessarily be the asset that is claimed exempt.

Third, the reason for requiring a debtor to pay the expenses incurred by a trustee in pursuing settlement of a claim of the debtor, to which the debtor filed a tardy claim of exemption, is to prevent prejudice to the estate and the trustee caused by the tardy claim of exemption. If the debtor does not pay those costs, the costs will be paid by the estate, to the prejudice of other creditors. It is not fair to impose on a debtor's other creditors costs that were incurred because of the debtor's delay in claiming the exemption. Therefore, I disagree with debtor that requiring her to pay the trustee's expenses in this case is a penalty, which she can be required to pay only if there is a known fund from which the payment can be made.

Fourth, the argument that debtor should not be required to pay because there is no specific fund from which payment can be made misses the point. The trustee's settlement efforts would have resulted in a \$40,000 fund for the estate, but for debtor's belated claim of exemption. Debtor can hardly fault the trustee for failing to recover a fund from which payment could be made when it was her belated claim of exemption that resulted in loss of the fund.

Debtor also argues that she should not have to pay, because the trustee still owns the prepetition disability claim, which may produce proceeds. Therefore, she argues, "the trustee retains the ability to mitigate the prejudice found by this Court by settling the claim." Debtor's Objection to Trustee's Statement of Costs and Fees at 2:23-25. Although that may be so,

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any recovery from the prepetition disability claim is highly speculative. If the estate ultimately recovers on the disability claim and if debtor can show that the legal work done on the unsuccessful \$40,000 settlement reduced the amount of legal work necessary for the trustee to obtain that ultimate recovery, she may apply to the court for reimbursement of the amount by which the earlier work reduced the need for later work that led to recovery.

Debtor makes two specific objections to the amounts claimed by the trustee.

First, she argues that the trustee is not entitled to payment of the trustee's fee and costs that he would have received had he recovered \$40,000 through the settlement. I agree. Although there is authority that would support reimbursement to the trustee for his efforts in pursuing an asset that is determined to be exempt after a debtor files a late claim of exemption, e.g., Blaise, 116 B.R. at 402, in this case I will not require debtor to pay the amount claimed by the trustee for his lost fee and costs, \$4,750.00 plus \$5.72, because he never asserted prejudice to himself from loss of his trustee's fee as a basis for his objection to debtor's claim of exemption. He argued that debtor had acted in bad faith, which argument I rejected. He also argued, and I agreed, that the estate was prejudiced by incurring attorney fees and costs in pursuing the settlement. See Memorandum of Points and Authorities in Support of Trustee's Objections to Claimed Exemptions at 6:11-15; 7:19-20. He never mentioned that he might assert a right to payment of his lost trustee's fee.

Because the trustee never mentioned any prejudice to himself from loss of his trustee's fee, my letter ruling did not address it. The letter ruling discusses the trustee's claimed prejudice to creditors due to the estate's expenditure of attorney fees and costs in pursuing the settlement, and concluded that the allowance of debtor's exemption would be conditioned on her payment of the trustee's fees and costs incurred in pursuing the settlement. August 4, 2004 Letter Ruling at 6. That referred to the attorney fees and costs charged to the estate related to the settlement, not to the trustee's fee and costs that were lost as a result of the failed settlement.

The time to raise the issue of the trustee's lost fee was before I ruled on the objection. I will not condition the allowance of the exemption on payment of the fee the trustee lost as a result of the loss of the asset.

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Second, debtor argues that she should not be required to pay the trustee's attorney fees and costs that were not incurred in pursuing settlement of debtor's claim against NW Mutual. I agree with debtor. As I said in my letter ruling, the allowance of debtor's claim of exemption is conditioned on her "payment of the trustee's fees and costs incurred in pursuing settlement." August 4, 2004 Letter Ruling at 6. Fees and costs incurred in objecting to the claim of exemption are not part of pursuing settlement. The trustee presumably would have objected to debtor's claim of exemption, regardless of whether the claim was made in the initial schedules or, as here, was made late. Therefore, debtor should not have to reimburse the trustee for fees and costs incurred in objecting to the claim of exemption.

I have reviewed the trustee's counsel's itemized statement of fees and costs, as well as the copy of the statement on which debtor indicated her objection to specific charges. Set out in the table below are the charges that I will disallow. I have disallowed any charges that clearly do not relate to pursuit of the settlement with NW Mutual. In addition, I have disallowed one-half of charges that appear to relate to both the exemption issue and the settlement issue, such as for attendance at the hearing, based on my estimation that half of the time was spent on the exemption issue.

In calculating the amount to be disallowed, I used the hourly rates indicated in the fee statement of \$225 per hour for Ms. Johannsen and \$110 per hour for Ms. Duncan. In the table below, I separately set out a description of tasks for which I am disallowing fees only if there were other tasks included in the same time entry that I allowed. If I disallowed fees for all tasks described in a particular entry, I simply indicated "All" under "Task."

There were a few entries that mentioned S. Riedlinger. I did not disallow fees relating to counsel's discussions with Mr. Riedlinger. Mr. Riedlinger was debtor's state court attorney for her claim against NW Mutual, who would have been consulted with regard to settlement issues. I have disallowed the entire cost of employing counsel, as the application shows that counsel would have been employed for purposes other than pursuing settlement with NW Mutual.

Further, I have disallowed charges incurred by the trustee after the date I issued my letter ruling denying the trustee's motion to approve the settlement. At that point, the only issue left with regard to the settlement was the drafting of the order, which was done by Mr. Bell.

Date	Time Spent	Amount Charged	Task
1/16/04	1.3	292.50	Research re: disability insurance policies and exemptions
1/23/04	.3	33.00	All
2/24/04	.2	45.00	Discuss exemption issues and response with client
3/3/04	3.6	810.00	All
3/4/04	.3	67.50	Receipt and review schedules from client
3/24/04	.3	67.50	Receipt and review debtor's amended schedules and claim of exemption; telephone call to client re: same ¹
3/24/04	.4	44.00	All
3/25/04	1.2	270.00	All
3/29/04	.1	22.50	All
3/29/04	1.9	427.50	All
3/29/04	.2	22.00	All
3/30/04	.2	22.00	All
4/1/04	.2	22.00	All
4/2/04	1.4	315.00	All
4/4/04	3.5	787.50	All
4/6/04	.1	22.50	All
4/9/04	.2	45.00	All

¹ The entry for this date also includes "voicemail from client regarding challenges to new exemption claims." Although I would disallow any charges for that item, counsel does not appear to have charged the trustee for that work. There is no time entry for it, and the time entries for the other tasks performed that day add up to .6 hours, which is the amount counsel charged for the day's work.

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Date	Time Spent	Amount Charged	Task
4/10/04	.2	45.00	All
4/13/04	.7	157.50	All
4/14/04	.2	45.00	All
4/14/04	.3	33.00	All
5/12/04	.4	90.00	All
5/21/04	1.1	247.50	All
5/21/04	.5	55.00	All
5/24/04	.2	45.00	Allow 1/2 - hearing on both objection to settlement and objection to exemption
5/25/04	1.55	348.75	Allow 1/2 - same as above
5/25/04	.3	33.00	All
5/26/04	2.35	528.75	Allow 1/2 - same as 5/24
5/28/04	.2	45.00	Allow 1/2 - same as above
6/2/04	1.95	438.75	Allow 1/2 - same as above
6/7/04	.05	11.25	Allow 1/2 - same as above
6/8/04	.1	22.50	Allow 1/2 - same as above
6/10/04	.1	22.50	Allow 1/2 - same as above
6/16/04	.1	22.50	Allow 1/2 - same as above
6/18/04	.5	112.50	Allow 1/2 - same as above
6/21/04	.1	22.50	Allow 1/2 - same as above
6/22/04	.05	11.25	Allow 1/2 - same as above
6/23/04	.2	45.00	Allow 1/2 - same as above
6/28/04	.15	33.75	Allow 1/2 - same as above
8/11/04	.5	112.50	Allow 1/2 - same as above
8/12/04	.1	22.50	All
8/12/04	.2	45.00	All

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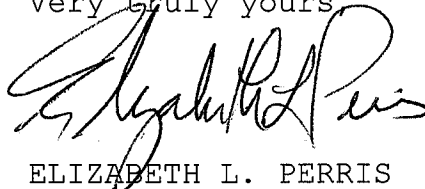
Date	Time Spent	Amount Charged	Task
8/16/04	.2	45.00	All
8/26/04	.3	67.50	All
8/30/04	.1	22.50	All
9/2/04	.3	67.50	All
9/9/04	.2	45.00	All
9/10/04	.1	22.50	All
9/16/04	.6	135.00	All
9/21/04	.1	22.50	All

These disallowed charges total \$6,339.00, leaving attorney fees of \$4,755.50 (\$11,094.50 minus \$6,339.00) relating to the settlement of the NW Mutual claim.

Debtor also objects to the \$36.41 in costs charged to the trustee by his counsel, arguing that it is not possible to tell from the detail provided which of those costs, if any, were incurred in pursuing the settlement of the NW Mutual claim. I agree. Debtor will not be required to pay those costs.

Accordingly, I will enter an order requiring debtor to pay to the trustee \$4,755.50 within 30 days of entry of the order, as a condition of allowance of her claim of exemption under ORS 743.050.

Very truly yours



ELIZABETH L. PERRIS
Bankruptcy Judge

cc: Thomas M. Renn